United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-1373

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1373

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK SACCO and BENJAMIN GENTILE,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF OF APPELLANT SACCO

FRANK SACCO
APPELLANT PRO-SE
POST OFFICE BOX PMB
ATLANTA, GA. 30315

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PREAMBLE

Appellant Sacco specifically requests that oral argument by Michael C. Eberhardt, Special Attorney for the Government as a prelude to determination of this cause be rejected upon the ground that this Court denied appellant the same privilege.

Had appellant Sacco been afforded the privilege to orally argue his issues, it would have expedited the determination of the numerous and complex questions presented by this appeal, and would have facilitated the Court's comprehension of the voluminous facts pertaining to the "taint" issue and other issues leading to this appeal.

This reply brief is intended to supplement the original brief submitted, and, therefore, does not contain a point by point refutation of Appellee's brief. Rather, this brief attempts to clarify certain factual discrepancies, and appellant still places primary reliance on his original brief. Any omission of questions raised in the original brief is not intended as a concession of the issue to the Government.

APPELLANT SACCO'S REPLY TO POINT III
OF THE GOVERNMENT'S BRIEF

The government relies heavily upon the fact that escape has long been recognized as a proper ground for dismissal of appellate matters and cite Estelle v Dorrough, 420 U.S., 534 (1975), but what they fail to recognize is that when the trial court granted the government's motion to end the "taint" hearing upon the ground of appellant's fugitivity, it overrode, without sufficient cause, appellants due process right to be heard on the merits of his claim of "taint" within the adversary context required by Alderman.

The due process clause of the Fifth Amendment and the Court's decision in Hovey v Elliott, 167 U.S. 409 (1897) and Hammond Packing Co. v Arkansas, 212 U.S. 322 (1909), establish that there are constitutional limitations upon the power of Courts, even in aid of their own processes, to dismiss an action without affording a party an opportunity for a hearing on the merits of his cause. Societe International v Rogers, 375 U.S. 197,209 (1958).

When the government's motion to end the "taint" hearing of appellant Sacco was granted, the trial court in the present case exceeded those constitutional limitations, because it thereby effectively denied appellant the opportunity to be heard on the merits of his claim of "taint".

As authority for its action, the trial Court cited Molinaro v New Jersey, 396 U.S. 365 (1970), apparently concluding that appellant's depature from federal custody disentitled him "to call upon the resources of the Court for determination of his claims". (See memorandum decision of June 3, 1976)

While it is true that the disposition by dismissals of pending appeals of fugitives has become an established principle of law, Estelle v Dorrough, Molinaro, supra, and other cases cited in the government's brief, the trial court's reliance on that principle in the present case was misplaced. The District Court was not presented with an appeal of final conviction. Rather, it was in the midst of a post-trial "taint" hearing to determine whether all or a substantial portion of the government's trial evidence was "tainted" by the exploitation of illegally overheard conversations. The resolution of that issue controlled the finality of appellant's conviction and therefore directly involved appellant's right to be heard in his own defense, a right secured by the due process clause of the Fifth Amendment. Boddie v Connecticut, 401 U.S. 371, 377 (1971); In Re Oliver, 333 U.S. 257, 273 (1948); Hovey v Elliot, supra, at 417, the trial Court's ruling thus failed to note

> ... the distinction between the inherent right of defense secured by the due process clause of the Constitution and the mere grace or favor giving authority to review a judgment by way of error or appeal. Id at 443

Forced with such serious constitutional requirements, the trial court was not permitted to deny appellant "his day in court", In Re Oliver, supra, at 273, simply as a punishment for escape. Such action was prohibited by Hovey v Elliott, supra where the Court ruled that to punish for contempt by striking the defendant's answer from the files, as by default, was a denial of due process. See Hammond Packing Co. v Arkansas, supra, at 349. The same reasoning applies here where the trial Court punished for for escape by, in effect, striking appellant's motion to suppress and convicting him "as by default".

Appellant's departure from Federal Custody may have been a bad decision but, absent any demonstrable countervailing government interest of overriding significance, Boyle v Connecticut, supra, at 377, the trial court's action in terminating the "taint" hearings violated appellant's right to due process of law. Illinois v Allen, 397 U.S. 337 (1970). The effect of the Court's action was to foreclose appellant without sufficient cause from obtaining a hearing on the merits of his claim of "taint" in the adversary context required by Alderman.

In Alderman v United States, 394 U.S. 165, (1969), the Supreme Court specifically held that records of illegal surveillance as to which any petitioner has standing to object

should be turned over to him without in camera screening. In outlining the procedures to be followed by a District Court in determining whether the evidence against a defendant grew out of his illegally overheard conversations, or conversations occurring on his premises, the Court stressed the necessity for reaching such a determination through adversary proceedings. Alderman, supra, at 183-85, the Court stated:

> Armed with the specified records of overheard conversations and with the right to cross-examine the appropriate officials in regard to the connection between those records and the case made against him, a defendant may need or be entitled to nothing else. Id at 185.

In the instant matter, appellant is not claiming that he is entitled to anything else; rather, he seeks only that to which he was entitled in the first instance, namely a completed Alderman hearing.

Subsection 'D' of Point III in the government's brief tries to convince this Court that the record in this case establishes an absence of "taint and the existence of an independent source. It is the height of effrontery for the government to make the bland statement that there has been three "taint" hearings conducted and that appellant has not shown that any

conversation pertaining to Robbins was ever intercepted or that the New York investigation or prosecution of appellant was based on any information resulting from the illegal New York wiretaps.

In the first instance, the Court should be advised that there was only one completed "taint" hearing, that being in the Middle District of Florida, Tampa, Florida, and appellant was precluded from introducing evidence or testimony concerning the other "taint" hearings that were pending in the District of Maryland and the case at bar. Secondly, had appellant been afforded the opportunity to carry his initial burden under Alderman, supra, he would have proved that a substantial portion of the case against him was the result of the illegal wiretapping in question. This proof would have been substantiated by the tapes themselves therein.

With respect to the government's answer that the Court did not err in denying appellant a pre-trial evidentiary hearing, they come up with a poor excuse that the preparation for the hearing would have entailed at least several months to allow for the duplication and furnishing of some 439 tape recordings which contained over 15,000 conversations. They also complain about the time it would have taken and the summoning of dozens of witnesses. (Gov. tr p 29)

The government's failure to disclose to the Court prior to trial its knowledge of the illegal Westchester wiretaps is what set in motion the disorderly procedures which ultimately led to appellant being denied a full and complete Alderman hearing.

In further support of the law cited in appellant's brief that the Court erred in not granting his pre-trial motion for the evidentiary hearing pertaining to the illegal wiretaps, Section 2.1 (b)iii of the ABA Discovery Standard provides in mandatory language:

> (b) The prosecuting attorney shall inform defense counsel:
>
> (iii) if there has been any electronic surveillance (including wiretapping) of conversations to which the accused was a party of or his premises.

The commentary to §2.1 (b) (iii) points out that the standard is designed to permit the pre-trial exploration of collateral issues of evidence suppression, especially in light of the holding of Alderman. Although recognizing that Alderman did not specify the timing of required disclosures, the commentary cites several reasons for disclosure prior to trial, the foremost being procedural regularity. Id § 2.1 (b) (iii), comment C at 71-72; See Id § 1.1 comment (b) at 28-30.

In the present case, the government's failure to disclose resulted in substantive and procedural irregularities.

Foremost among those irregularities was the disjointed manner in which the post-trial "taint" hearings were conducted. First, the government makes the represenation to the Court that they had no knowledge of the wiretaps, after the Court is finally convinced that there was illegal wiretapping by New York State Authorities, it grants the post-trial "taint" hearing but does not conduct it right away because of "taint" hearings being conducted in other Federal Courts . When the hearing finally gets underway, the government shifts their strategy and requests of the Court to determine the legality of the wiretaps. After lengthy delays, the government changes horses in mid-stream and decide to argue the "taint" without the legality of the wiretaps having been determined in Federal Courts. Appellant was never provided with the tapes until after a portion of the evidentiary stage of the hearing was concluded and he was further required to show "taint" without the benefit of missing tapes and tapes that were possibily tampered with.

While the lower Court in this case was not too concerned with an issue of "taint" prior to trial, the District Court in Baltimore expressed concern over the fact that the government had not disclosed the "taint" problem prior to trial.

That Court stated the following:

> If that had occurred, we would all have been on our guard, and I suggest, could have handled this matter more cleanly....."
> (Balt. tr 1648)

The Court in Alderman was unwilling to countenance the displacement of well-informed advocacy by the use of in camera procedures. Alderman, supra, at 184. This Court should be even more reluctant to sanction the displacement of well-informed advocacy by the regular procedures which were caused by the government's own lack of candor. Cf. Giglio v United States, 405 U.S. 150 (1972).

With respect to Point IV of the government's brief, the government would like this Court to go along with the theory that if the record does not support the prosecutor's reference to improper remarks that is, it can be of little significant.

The latter is with regards to the following: (quotation omitted at page 32-33 Govt. Brief - reciting in parts) . . . while the record does not support the prosecutor's reference to Mr. Palumbo, a matter of little significant . . .

No matter how much the Appellee attempts to justify the prosecutor's action of misconduct, the fact remains that

there were improper, errorneous, and misleadings assertions of the evidence and facts which should not have entered into the records nor been admitted before the jury and; such did in fact prejudiced the Appellant's trial to the extent as to deny him a fair and impartial trial secured by the Sixth Amendment to the Constitution.

With respect to Point VIII of the government's brief, appellant Sacco respectfully refers this Court to the record, Tr pp 1495-1496, wherein the following took place:

THE COURT: No exceptions?

Mr Sacco: Yes, your Honor. I except to the entire charge on the following grounds:

(a) it is contrary to law;
(b) it was prejudicial;
(c) your Honor's failure to properly instruct the jury as to the essential elements of the crime;
(d) your Honor erroneously instructed the jury of the elements of the crime charged;
(e) your Honor, there is no mentioning of Section 892 which is the Extortionate extension of credit that your Honor charged in the charge to the jury on the first count. And I think that was wrong, your Honor.....

As this Court can see, there is a factual discrepancy from the government's representation that appellant Sacco did not register an objection to at least four portions of the charge.

The government's answer to appellant's contention that the Court's charge on the scope of the conspiracy incorrectly stating that Extortionate Extensions of Credit* were part of the illegal agreement charged in Count Three which actually only charged unlawful debts by extortionate means was only a misstatement in that regard cannot be taken lightly because the impression was left in the minds of the jury that appellant had conspired to make Extortionate Extensions of Credit. The Court refused to recharge the jury(tr 1496-1497-1498-1499) with respect to this conceded error and all it did was to re-read a very small portion of Count three to the jury which contained the right language of the indictment. Tr. 1502) No explaination or instruction was given to the jury that appellant was not charged with conspiracy to make Extortionate Extensions of Credit*.

In effect, what the Court did by its erroneous charge to the jury was to convey to them that there were two seperate

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* Extortionate Extension Of Credit is a seperate and distinct offense under Section 892, Title 18 U.S.C.

offenses in Count III of the indictment which is in violation of Rule 8 of the Federal Rules of Criminal Procedure, which provides, in pertinent part:

> "(a) Joinder of offenses. Two or more offenses may be charged in the same indictment or information in a separate count for each offense...(emphasis provided)

In United States v Peterson, 524 F. 2d 167 (4th Cir 1975), cert. denied 96 S. Ct 1136, held that "conspiracy" is a seperate offense from that of "aiding and abetting", because conspiracy involves the elements of preconcert and connivance not necessarily inherent in the mere joint activity necessary to the crime of aiding and abetting. While the two crimes are not necessarily inconsistent, the verdict handed down by the jury did not specify as to which crime the appellant was convicetd. Another similar fact situation was in the matter of United States v Starks, 515 F. 2d 112 (3rd Cir. 1975). While Peterson and Starks, supra, are not directly on point, they are analogous to the error committed by the Court's charge. While the Extortionate Extension of Credit is an indictable offense under the United States Law, 18 U.S.C. § 892, proof thereof or refference to should not be permitted to sustain

charges of Extortionate means of collection under 18 U.S.C 894.

C O N C L U S I O N

For the foregoing reasons and those proffered in the initial brief, it is submitted that the judgment of conviction id due to be reversed.

Respectfully submitted

Frank Sacco

Frank Sacco,
Appellant, pro se
Box P.M.B
Atlanta, Ga. 30315

CERTIFICATE OF SERVICE

I hereby Certify that I have served 6 copies of the foregoing brief upon the Clerk of the Court for the United States Court of Appeals for the Second Circuit, United States Courthouse, Foley Square, New York, New York and a true copy to Michael C. Eberhardt, Special Attorney, United States Department of Justice and a true copy to Audrey Strauss, Assistant United States Attorney for the Southern District of New York, Foley, Square, New York, New York, on the date indicated below by placing same in the mail box of the U.S. Penitentiary, Atlanta, Georgia.

Dated: July 5th, 1977

Frank Sacco
Appellant, pro se